BRB No. 05-0681

JAIME EMOCLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY/NAF	)	DATE ISSUED: 05/11/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Jay Lawrence Friedham (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Normand R. Lezy (Leong Kunihiro Leong & Lezy), Honolulu, Hawaii, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-LHC-2876, 2003-LHC-2891) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a tractor operator at employer's Kalakaua Golf Course in Hawaii. In March 2003, he was involved in an incident at work with a co-worker which resulted in his receiving a notice of suspension on April 16, 2003. Claimant requested and received a reduction of the suspension from two days to one day; however, on April

21, 2003, claimant called in sick to work and has not returned since. Decision and Order at 4-5. Claimant saw Dr. Choy, a psychologist, on April 21, 2003, and Dr. Choy diagnosed claimant with a schizoaffective disorder with symptoms of paranoia, depression, suicidal and violent tendencies, auditory hallucinations, and insomnia. Dr. Choy and Dr. Wu, claimant's psychiatrist, reported claimant's history of the conflict with his co-worker, as well as conflicts with his supervisor, and a fear of the loss of his job, as factors contributing to claimant's psychological disorder. As a result of his disorders, claimant was placed on medication. Decision and Order at 5; Cl. Exs. 2, 4.[1] During the course of his treatment, claimant told Dr. Choy that he wanted to kill Mr. Lillie, his family, and himself. Dr. Choy was obliged to inform Mr. Lillie of the threat. After Mr. Lillie informed his supervisors of the threat, they began the process of terminating claimant's employment. Effective July 31, 2003, claimant's employment was terminated due to his threat of bodily harm and for giving false information on his employment application. Claimant filed claims for benefits under the Act, alleging he sustained a work-related psychological disability and a hearing loss.

The administrative law judge denied both claims. She first found there was no dispute that claimant suffered a psychological harm. Decision and Order at 8-9. She found, however, that claimant's breakdown was not the result of "harassment" at work, as claimant had unusual external stresses that triggered his harm. Thus, she concluded that claimant failed to establish that his psychological condition in 2003 was caused by his working conditions. Decision and Order at 15. Claimant appeals the denial of benefits for the psychological injury, and employer responds, urging affirmance.[2]

Initially, claimant contends the administrative law judge erred by denying him due process, as he alleges she denied him the chance to fully present his case at the hearing. Specifically, claimant alleges the administrative law judge limited his ability to draw testimony from Mr. Lunasco, a former co-worker of claimant's. A review of the transcript reveals that the administrative law judge initially stated that this was not a harassment or termination proceeding, so she did not want to hear about working conditions from Mr. Lunasco; she only wanted to know what Mr. Lunasco told Dr. Choy.

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[1]In June 2001, claimant had a conflict with and threatened his supervisor, Mr. Lillie, alleging he had been harassed by Mr. Lillie and denied leave to assist his wife during treatment for a serious illness. Claimant was referred for counseling, diagnosed as psychotic, and put on medication. After four sessions, he was able to return to work, and after three months he stopped taking medicine of his own accord. Claimant had no problems at work until the incident in 2003, which occurred two months after his wife was diagnosed with another serious illness. Decision and Order at 3-5.

[2]Claimant has not appealed the denial of benefits in his hearing loss claim.

Tr. at 149. Realizing that working conditions are indeed at the heart of claimant's claim, the administrative law judge corrected herself and instead limited Mr. Lunasco's testimony to those facts supportive of claimant's claim. She stated she did not want to hear testimony about disputes Mr. Lunasco had with Mr. Lillie. Tr. at 152-153. Thus, although the administrative law judge initially gave an erroneous instruction during the hearing, she cured it. Claimant has cited to no other specific examples in the transcript which might support his claim that he did not receive a fair hearing.[3] As the administrative law judge has the authority to control the proceedings before her, 29 C.F.R. §18.29(a); *see also* 5 U.S.C. §556; 33 U.S.C. §§923, 927; *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); 20 C.F.R. §702.331 *et seq.*, we reject claimant's contention and decline to order a new hearing.

Claimant also contends the administrative law judge erred in finding that his psychological condition is not work-related. Specifically, he argues that she did not consider whether his general working conditions, including treatment by Mr. Lillie, aggravated his psychological condition, and she erred in rejecting Dr. Choy's undisputed opinion that claimant's working conditions contributed to his psychological condition. For the reasons set forth below, we vacate the denial of benefits for claimant's psychological injury, and we remand the case for the administrative law judge to reconsider the issue of whether claimant's psychological condition is work-related.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, there is no dispute that claimant suffered a psychological harm. To establish the compensability of his claim for this harm, however, claimant must establish that working conditions existed which could have caused, aggravated, or contributed to his psychological condition. *See Bartelle v.*

[3]We do not accept claimant's citation to the number of times the word "sustained" was used in the hearing, via the transcript index, as support for his argument. The administrative law judge sustained numerous objections from both attorneys for various reasons. A blanket complaint is insufficient to establish a denial of due process. *See generally United States v. Hays*, 515 U.S. 737 (1995); *Gyadu v. Workers' Compensation Comm'n*, 930 F.Supp. 738 (D.Conn. 1996).

McLean Trucking Co., 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting); *Jones v. J. F. Shea Co., Inc.*, 14 BRBS 207, 210-211 (1981). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Moreover, for working conditions to be "stressful" to a claimant, they need not be circumstances universally recognized as "stressful;" they need only be occurrences that are stressful to that claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Sewell*, 32 BRBS 127. It is his reaction to the conditions and events that is relevant.[4] *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994). Employers must accept "the frailties that predispose" their employees to injury. *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979).

The administrative law judge heard testimony from Ms. Shearer, Mr. Lunasco, Mr. Lillie, and Dr. Choy. However, she rejected Dr. Choy's opinion that claimant's psychological condition is related to his work, stating that his "investigation" into claimant's situation was "incomplete," as she found that he talked only to Ms. Shearer and Mr. Lunasco, whom she discredited, and he did not consider all the facts before him. Decision and Order at 9-12. She, therefore, determined that claimant did not establish a causal nexus between his work and his psychological condition. Decision and Order at 15.

First, the administrative law judge did not properly apply Section 20(a) to this case, as she placed on claimant the burden of establishing that his condition is work-related. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.*, 32 BRBS 224 (1998). Rather, claimant bears the burden of establishing the harm and working conditions elements of his *prima facie*, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), and the administrative law judge must ascertain whether there were conditions at claimant's workplace that *could* have contributed to his psychological condition, thereby

[4]The conditions which affect claimant here also need not amount to "unusual stress," "harassment," or "bad behavior." Any behavior that caused claimant stress could suffice to establish the "working conditions" element. *See Sewell*, 32 BRBS 127; *Konno*, 28 BRBS 57. Also, it is irrelevant whether Mr. Lillie may have singled claimant out. If Mr. Lillie behaved in such a manner as to affect claimant's condition, it does not matter whether he treated others the same way or whether others reacted as claimant did. *Id.* The employer takes the claimant as he finds him, and under the strict liability standards of worker's compensation, the issue is whether an injury arises out of the conditions of employment.

invoking the Section 20(a) presumption. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Sewell*, 32 BRBS at 129. Contrary to established precedent, the administrative law judge proceeded directly to an analysis of whether claimant proved the existence of a causal nexus between his employment and his psychological condition without taking the necessary steps. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

As stated previously, it is undisputed that claimant has satisfied the "harm" element, and the issue is whether he has also satisfied the "working conditions" element. Claimant testified that Mr. Lillie spied on him, intimidated him, yelled at him, threatened to fire him, and denied him time off work to help his ailing wife. Claimant also testified that he was wrongfully reprimanded for breaking equipment and that he was wrongfully accused by a co-worker of harassment and, thus, wrongfully suspended. Tr. at 343-346, 349, 351-353., 363. The testimony of Ms. Shearer and Mr. Lunasco supported some of claimant's accusations, but, as is within her discretionary authority, the administrative law judge rationally discredited their testimony based on Ms. Shearer's personal bias in favor of claimant and on the fact that Mr. Lunasco did not work for Mr. Lillie after 2001 and could not know the working conditions in 2003. Decision and Order at 10-11; *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge, however, did not assess the credibility of claimant's testimony or that of Mr. Lillie or make a finding as to whether there were any conditions at claimant's place of employment that could have aggravated or contributed to his psychological condition. *Sewell*, 32 BRBS 127. Accordingly, we must remand the case for the administrative law judge to determine whether claimant satisfied his burden of establishing the working conditions element necessary for invoking the Section 20(a) presumption.[5] *See generally Lacy v. Four Corners Pipe Line,*

[5]To the extent work-related disciplinary actions, such as claimant's suspension, contributed to his condition, then *Marino v. Navy Exchange*, 20 BRBS 166 (1988), applies to preclude compensation for any harm caused by those legitimate personnel actions. In *Marino*, the Board held that a psychological injury resulting from a legitimate personnel action is not compensable under the Act because the event is not a "working condition" and to hold otherwise would hinder the employer in conducting its business. If *Marino* is applicable to this case, claimant challenges the holding therein as being unsupported by the Act. We reject claimant's argument. *Sewell*, 32 BRBS 127. We recognize the lack of precedential value of unpublished decisions of the United States Court of Appeals for the Ninth Circuit, 9th Cir. R. 36-3; nevertheless, we note that the Ninth Circuit has cited as support for affirming a denial benefits the Board's holding in *Marino*. *Turner v. Todd Pacific Shipyards Corp.*, 990 F.2d 1261, No. 91-70524 (9th Cir. April 8, 1993) (table); *see also Army & Air Force Exchange Service v. Drake*, 172 F.3d 47, No. 96-4229 (6th Cir. Dec. 3, 1998) (table); 6th Cir. R. 28.

17 BRBS 139 (1985). If claimant establishes that working conditions existed that could have aggravated or contributed to his psychological condition, then the administrative law judge must invoke the Section 20(a) presumption, address whether employer produced substantial evidence to rebut the presumption and, if so, weigh the evidence as a whole to determine whether claimant's psychological condition is related to his employment with employer. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In weighing the medical evidence if the administrative law judge finds claimant established a *prima facie* case, the administrative law judge is not free to substitute her opinion for that of Dr. Choy regarding the cause of claimant's condition. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Psychiatrists and psychologists, not the administrative law judge, are the experts on mental health illness. *Id.* In *Pietrunti*, the court held that, as the doctor had treated Pietrunti for several years, and was continuing to do so, and as his opinion that Pietrunti's psychological condition was related to his work-related arm injury was supported by the opinions of other doctors, it was erroneous for the administrative law judge to reject the doctor's opinion and find that the psychological injury was not work-related. *Pietrunti*, 119 F.3d at 1042-1044, 31 BRBS at 90-91(CRT). In the instant case, Dr. Choy specifically noted that claimant was troubled by the incident at work with his co-worker and that he is intimidated by the prospect of working. Cl. Ex. 2. He testified that he is treating claimant for a stress-related disorder involving psychosis and pressures on the job. Dr. Choy also discussed claimant's conflicts with his supervisor and his co-worker, as well as his family stresses, and he noted that claimant was pre-occupied with the possibility of losing his job. Tr. at 22-24, 56-60, 79, 122-123, 135, 138. Dr. Wu reported that claimant has a history of conflicts at work with co-workers and with his supervisor and that claimant was worried about his job status and about the conflict with his co-worker. Cl. Ex. 4. As these doctors offer relevant opinions regarding the relationship between claimant's job and his psychological condition, the administrative law judge must rely on this medical evidence and may not substitute her opinion on medical causation for that of the experts. *See Pietrunti*, 119 F.3d at 1042-1044, 31 BRBS at 90-91(CRT).

Accordingly, the administrative law judge's Decision and Order Denying Benefits for a psychological injury is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge